No. [illegible]

BENTLEY S. HANDWORK, RALPH C. BOOMER, and PHILIP W. LOVE, Individually and as Trustees, etc.,

Petitioners,

vs.

HORACE A. YOUNG, as Trustee in Bankruptcy of the Estate of George R. Joslyn, Bankrupt,

Respondent.

BRIEF OF HORACE A. YOUNG IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

Nos. 695 and 696

BENTLEY S. HANDWORK, RALPH C. BOOZER, and PHILIP W. LOTZ, Individually and as Trustees, etc.,
Petitioners,

vs.

HORACE A. YOUNG, as Trustee in Bankruptcy of the Estate of George R. Joslyn, Bankrupt,
Respondent.

BRIEF OF HORACE A. YOUNG IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Opinion Below.

The opinion of the Court of Appeals below is reported in 179 Fed. (2d) 70, and is set forth in full at pages 233-249 of the Transcript of Record.

STATEMENT OF MATTER INVOLVED.

The matters involved herein are so clearly and succinctly summarized in the opinion of the Court of Appeals that we respectfully direct this Court's attention thereto for a short statement thereof (Tr. 233-249).

This is a plenary suit arising out of a fraudulent voluntary bankruptcy. The bankruptcy case was reopened in 1946 because George R. Joslyn, Bankrupt, had filed fraudulent schedules in 1936, in which he (1) fraudulently failed to schedule his true assets, and (2) fraudulently failed to list his true creditors (Tr. 124-5, 135, 138-9, 140, 152, 154-5). (See *In re Joslyn's Estate,* 171 Fed. (2d) 159, at page 161.). In the effort to conceal his frauds, the bankrupt committed five deliberate perjuries (Tr. 138-9). This case is a separate plenary suit brought by the Bankruptcy Trustee to recover from third parties (trustees for the fraudulent bankrupt) certain of the assets fraudulently concealed by the bankrupt in the bankruptcy case, consisting of income from two vested equitable life estates under two trusts.

The order appealed from in the District Court in this plenary suit was an order dismissing plaintiff's complaint upon the sole ground (held by the Court of Appeals to be erroneous) that the vested equitable life estates of the fraudulent bankrupt, George R. Joslyn, "are not property within the meaning of Section 70 of the Bankruptcy Act," and therefore "may not be reached by creditors nor a bankruptcy trustee," because of Section 49 of the Illinois Chancery Act (Section 49 of Ch. 22, Ill. Rev. Stats.,

1947) (Tr. 203). This order of dismissal was reversed by the Court of Appeals, with directions to the District Court to proceed in accordance with its conclusion that the fraudulent bankrupt's vested equitable life estates are administrable property in bankruptcy because, under the law of Illinois, as well as under the decisions of the Federal Courts, they are transferable property, the "title" to which has "vested by operation of law" in respondent as Bankruptcy Trustee as provided in Section 70(a)(5) of the Bankruptcy Act (11 U.S.C. 110(a)(5)). This case will therefore still be pending in the District Court and will proceed there to a final decree upon issues yet to be made and evidence yet to be offered and introduced, in the event *certiorari* is denied in this Court.

Petitioners have not even filed as yet their answer to the respondent's complaint in the District Court, the dismissal order having been entered upon a mere motion. For all respondent or this Court can know, petitioners as defendants in the District Court may offer new and additional defenses in the trial court, having nothing whatever to do with the issues heretofore raised or considered in either the District Court or in the Court of Appeals, which will ultimately dispose of this plenary suit. Such new and additional defenses may raise issues requiring a trial by jury. Should this occur, then this Court's labors in passing upon any of the issues raised in the Petition for Certiorari would be wholly useless and unnecessary, and just so much "time and effort" thrown away.

Although it is true that this Court retains power to grant *certiorari* even though the case has not yet been finally disposed of in the courts below, nevertheless this Court has repeatedly said that "except in extraordinary cases,

the writ is not issued until final decree," and has warned that the circumstance that the decision of the Court of Appeals is not a final one is "a fact that of itself alone furnished sufficient ground for the denial of the application." (*Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, 258; *American Construction Co.* v. *Jacksonville etc. Ry. Co.*, 148 U. S. 372, 378, 384; and many other cases).

This Court, therefore, might quite properly reject *certiorari* at this preliminary point in this case because there is no certainty that any of the issues raised in the Petition for Certiorari will ever be raised, reached and disposed of in the District Court when the case is tried and the final decree or judgment is ultimately rendered in the trial court.

Of course, the Court of Appeals' opinion is the "law of the case." But *certiorari* does not properly lie to review an expression of opinion in the Court of Appeals upon legal issues, when the case in the District Court may or may not be utimately disposed of upon such issues, but upon other and wholly different issues of of face and law, which, as we have seen above, have not yet been either pleaded or proven in the trial court.

Every litigant who loses in the Court of Appeals might like this Court to "straighten out and correct" for his benefit the expressions as to the "law of the case" in the opinion of the Court of Appeals. But it would greatly overburden, if not overwhelm, this Court should it attempt by granting *certiorari* to comply with such requests.

This Court cannot be expected to review opinions of the Courts of Appeals and grant *certiorari* to correct ex-

pressions therein merely because the losing parties believe they would be better able to make their future defense of the same law suit in the District Court if such review could be obtained.

Upon this ample ground alone, this Court might, and indeed should, properly reject *certiorari* herein at this preliminary point in this litigation. All that follows in this brief can be ignored if this Court decides to reject *certiorari* upon this adequate ground, which its past practice and many decisions clearly warrant.

The Questions Presented.

The questions presented are not truly stated in the Petition for Certiorari (p. 6-7).

The sole substantive issue correctly raised in the Petition for Certiorari is whether, under a proper interpretation of Section 70(a)(5) of the Federal Bankruptcy Act, a Bankruptcy Trustee may administer certain property of a fraudulent bankrupt, consisting of a vested equitable life estate in each of two *inter vivos* non-spendthrift trusts, *which property is fully transferable under both State and Federal law,* in spite of the fact that under an Illinois Statute (Section 49 of the Illinois Chancery Act), if certain proofs were made, such property could not be levied upon by state court creditors.

Section 70(a)(5) of the Bankruptcy Act provides that "title" to all property of the bankrupt which "he could by any means have transferred" is "vested by operation of law" in the Bankruptcy Trustee. Under both Illinois and Federal law, such property as is here involved, *i. e.*, the bankrupt's vested equitable life estates, are fully transferable. All that Section 49 of the Illinois Chancery Act does is to grant the right of state court creditors to levy upon or otherwise satisfy their claims out of such proper-

ties, with an exception in certain limited cases where the trusts are created "in good faith" by a third person.

The "Statement" in the Petition for Certiorari erroneously insists (p. 2-3) that "the sole ground" of the District Court's jurisdiction of the Bankruptcy Trustee's plenary action in the District Court is "an alleged diversity of citizenship"; and the principal point repeatedly made (p. 6-8, etc.) is that this (1) is "a diversity action in the Federal Court" in which (2) the Court of Appeals has "refused to follow local property law." There is no foundation for either of these misstatements, as the opinion of the Court of Appeals clearly shows.

In the first place, Federal jurisdiction in this case is not "grounded solely on diversity of citizenship," in spite of the most insistent repetition of this contention on almost every page of the Petition (p. 6, etc). On the contrary, the opinion of the Court of Appeals clearly and explicitly shows that the jurisdiction of the District Court was also based upon the voluntary "consent of the defendant(s)" under Section 23(b) of the Bankruptcy Act (Title 11, U. S.C.A., Section 46(b)), which provides as follows:

> "Section 23. Jurisdiction of United States and State Courts. • • •
>
> "(b) Suits by . . . the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this act had not been instituted, *unless by consent of the defendant,* except as provided in Sections 60, 67 and 70 of this act." (Italics added.)

That the petitioners (defendants in the District Court) did clearly in fact give their voluntary "consent" to the jurisdiction of the District Court is not only not denied by petitioners, but such actual consent is indisputably shown by the colloquy quoted in the footnote to the opinion of the Court of Appeals (Tr. 237), and also by the further colloquy

which appears on pages 194-5 of the Transcript, from which the colloquy in the footnote is taken. This fact of voluntary "consent" has been confirmed by *both* the District Court and the Court of Appeals (Tr. 219, 236-7), and therefore cannot be disputed in this Court, under the "two-court rule." *U. S.* v. *Commercial Credit Co.*, 286 U. S. 63, 67; and many other cases.

Moreover, even if petitioners had not voluntarily "consented" to jurisdiction of the District Court under Section 23(b), that Court also had jurisdiction under Section 70 (e)(3) of the Bankruptcy Act, in which it is provided that "for the purpose of such recovery," *i. e.*, recovery of the assets belonging to the bankruptcy estate from a third party, "where plenary proceedings are necessary," as in the case at bar, a Federal court "shall have concurrent jurisdiction" with the state courts. *Philips* v. *Turner*, 114 Fed. 726; *Collett* v. *Adams*, 249 U. S. 545; *Rodgers* v. *Bankers Commercial Co., Inc.*, 42 Fed. (2d) 906.

As for the repeated statements in the Petition to the effect that the issue in the Court of Appeals involved "local property rights," "local rules of property," and "a question of Illinois property law" (Petition, p. 6-7, etc.), these statements are also incorrect. As indicated above, the sole substantive issue in this case involves a proper interpretation of Section 70(a)(5) of the Bankruptcy Act, and there is no dispute whatever over the so-called "Illinois property law" holding that the bankrupt's vested equitable life estates are "property" of the fraudulent bankrupt which "he could by any means have transferred" under Illinois law (as well as under Federal law). The undisputed cases are set forth in the Court of Appeals' opinion[1] (Tr. 240-1);

[1] The Merchants' Loan and Trust Co. v. Patterson, 308 Ill. 519; Binns v. LaForge, 191 Ill. 598; Hummel v. Cardwell, 390 Ill. 526; Hiss v. Hiss, 228 Ill. 414; Blair v. Linn, 274 Ill. App. 23; Blair v. Commissioner, 300 U. S. 5; Brown v. Fletcher, 235 U. S. 589.

and none of these authorities is controverted or even referred to in the Petition for Certiorari.

Alleged Reasons For Allowance Of Writ.

Petitioners have not brought themselves within the scope of Rule 38(5) of this Court, which sets forth the limited instances in which *certiorari* will be granted by the Court.

It is not claimed in the Petition for Certiorari (p. 7-8) that the decision of the Court of Appeals is in conflict with the decision of another Court of Appeals on the same matter. Nor is it claimed that a state court has decided a federal question of substance not theretofore determined by this Court or in a way not in accord with applicable decisions of this Court. Nor is it contended that the Circuit Court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

What is claimed under "Reasons for Allowance of Writ" (p. 7-8) is, *first*, that the Court of Appeals has decided an important question of local Illinois property law in a way probably in conflict with applicable local decisions (the sole instance is a *dictum* in *Hummel* v. *Cardwell*, 390 Ill. 526) (Point I), and *second*, that the Court of Appeals has decided an important question of federal law in conflict with the applicable decisions of this Court which require the Federal Court "in this diversity case" to apply "Illinois property law" (*Erie Railroad* v. *Tompkins*, 304 U. S. 64, and cases following it) (Points II and III).

Finally, it is contended, *third*, (p. 8) that the Court of Appeals has decided an important federal question "in direct conflict with the policy established by this Court" under which it is asserted that the Court of Appeals

"should have remanded this case to the District Court with directions to provide appropriate submission to the state court of the question here involved." (Point IV.)

None of these so-called Reasons has any merit.

As shown in the Statement above, and more fully in the Argument below, there is no conflict between the opinion and decision of the Court of Appeals, on the one hand, and the actual decision of the Supreme Court of Illinois in *Hummel* v. *Cardwell*, 390 Ill. 526, on the other hand, upon any "question of Illinois property law," the sole conflict between them being over an interpretation of Section 70(a)(5) of the Bankruptcy Act, which is a question of Federal law and not a question of Illinois property law. (Point I.)

There is likewise no foundation for the contention that the opinion of the Court of Appeals conflicts with the rule in *Erie Railroad* v. *Tompkins*, 304 U. S. 64, because the doctrine of *Erie Railroad* v. *Tompkins* does not in any way preclude the right of the Federal Courts to construe uniformly the Federal Bankruptcy Act and because, if there were a conflict between the Federal Bankruptcy Act, on the one hand, and the Illinois property law purporting to restrict the administrability of the bankrupt's property under the Federal Bankruptcy Act, on the other hand, the latter and not the former would prevail. The cases are set forth in the opinion of the Court of Appeals[1] (Tr. 245-8); and none of these cases is controverted or even referred to in the Petition for Certiorari. (Points II and III.)

[1] Board of Trade of the City of Chicago v. Johnson, 264 U. S. 1; Page v. Edmunds, 187 U. S. 596; In re Landis, 41 Fed. (2d) 700; Board of Trade v. Weston, 243 Fed. 332; Marine Harbor Properties v. Manufacturers Trust Co., 317 U. S. 78; Kalb v. Feuerstein, 308 U. S. 433; Wright v. Union Central Life Insurance Co., 304 U. S. 502.

Where there is no real conflict within the meaning of Rule 38(5) of this Court, as we have shown, the Court, even if *certiorari* had been allowed, would dismiss the writ as improvidently granted. *Furness, Withy & Co.* v. *Yang-Tsze Ins. Assn.*, 242 U. S. 430; *Tyrell* v. *District of Columbia*, 243 U. S. 1.

As for petitioners' final contention (p. 8) that the Court of Appeals "should have remanded this case to the District Court with directions to provide appropriate submission [whatever that may be] to the state court of the question here involved," this is an issue which was never raised in the District Court, and was never raised in petitioners' brief in the Court of Appeals. This Court has repeatedly stated that it will not consider points not properly raised in or decided by the Federal Courts below (*Adams* v. *Mills*, 286 U. S. 397, 416; *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415, 418; and many other cases).

No contention was made in the petitioners' original or amended motion to dismiss complaint (Tr. 10, 181) that any issues in the complaint should be submitted to the state court. Nor was any such contention made in petitioners' so-called Appellees' Brief in the Court of Appeals. This idea really makes its first significant appearance in this case in the Petition for Certiorari in this Court. The case of *Thompson* v. *Magnolia Co.*, 309 U. S. 478, was cited (p. 48) in Appellees' Brief in the Court of Appeals (but without any suggestion that respondent should have been directed in the Joslyn Bankruptcy Case to bring a plenary action in the State Court as in the *Thompson* case), and as Point IV of their Petition for Rehearing in the Court of Appeals (Tr. 262-3), petitioners for the first time contended that "this case should be remanded for a state court proceeding," but without showing how this should or could be done.

As shown in the Argument below, the Court of Appeals had no power to remand this plenary case to the District Court "with directions to provide appropriate submission [sic] to the state court of the question here involved." This is an appeal in a plenary case, and is *not* an appeal in a bankruptcy case where directions to the Trustee in Bankruptcy as to the prosecution of litigation may appropriately be given. The power of the Court of Appeals in this plenary suit was necessarily limited either (1) to affirming the order of dismissal in the District Court, or (2) to reversing such order and remanding with directions to the District Court to proceed with the litigation in due course. There is no power or jurisdiction in the Federal Courts to transfer a plenary suit already pending in a District Court to a State Court for further litigation . Nor is there any power or jurisdiction in the Federal Courts in a plenary suit (as distinguished from a bankruptcy case), especially in the Court of Appeals, to direct the Bankruptcy Trustee to dismiss his case and proceed in some other court or forum.

Petitioners have, therefore, completely failed to bring themselves within the scope of Rule 38(5) of this Court by showing any conflict in decisions which would justify the granting of the writ in Appeal No. 695.

Certiorari Should Be Denied In Appeal No. 696.

Appeal No. 696 in this Court is a so-called cross-appeal by petitioners from findings and orders in the District Court holding that it had jurisdiction of the subject matter (Tr. 221).

Not only was this cross-appeal taken by petitioners from an order in their own favor granting them all of the relief prayed, as the Court of Appeals found (Tr. 237), but there

is not one word in the Petition for Certiorari which controverts the District Court's jurisdiction on at least diversity grounds. Nor do petitioners in any way controvert the finding of fact by both the District Court (Tr. 218-9) and by the Court of Appeals (Tr. 235-7) that the petitioners as defendants voluntarily consented to jurisdiction under Section 23(b) of the Bankruptcy Act. Moreover, petitioners themselves concede in their Petition for Certiorari (p. 2) that the District Court had jurisdiction of this action, although they erroneously state that such jurisdiction was based "on the sole ground of an alleged diversity of citizenship."

It is obvious that the writ of certiorari sought in Appeal No. 696 must be peremptorily denied in this Court for failure to show any reason whatsoever in the Petition why such writ challenging an admitted jurisdiction should be granted.

ARGUMENT.

I.

The Court of Appeals did not interpret Section 49 of the Illinois Chancery Act in direct conflict with the Decision of Hummel v. Cardwell, 390 Ill. 526, nor decide a question of Illinois property law contrary to the Illinois Statutes and Decisions in a diversity case.

We have already shown in the Statement above that the jurisdiction of the District Court in this plenary suit is not "grounded solely on a diversity of citizenship," as the Petition for Ceriorari repeatedly states (p. 6-7, etc.). On the contrary, the Federal Court's jurisdiction is not only based upon diversity of citizenship (which jurisdiction is conceded in the Petition for Certiorari (p. 2)), but is also based upon the voluntary consent found by both the District Court and the Court of Appeals to have been deliberately given by the defendants in the District Court under Section 23(b) of the Federal Bankruptcy Act, and also upon the fact that this is a plenary action to recover property belonging to the bankruptcy estate from third persons within Section 70(e) of the Bankruptcy Act.

However, we wish to make it clear that it would make no difference whatever if this were a case in which jurisdiction is "grounded solely on diversity of citizenship," for the reason that this plenary suit is brought to recover property, the "title" to which has "vested" in the Bankruptcy Trustee as property which the bankrupt "could by any means have transferred," and which is therefore administrable in bankruptcy under Section 70(a)(5) of the Fed-

eral Bankruptcy Act. It being conceded in the Petition for Certiorari (p. 2), and undeniably established by the admitted facts, that diversity jurisdiction exists, it necessarily follows that the Federal Court is the principal and proper court to construe the ultimate meaning and effect of Section 70(a)(5) of the Federal Bankruptcy Act; and the case of *Erie Railroad* v. *Tompkins* has not the slightest effect to prevent the Federal Court from construing such a uniform federal law in relation to bankruptcy as the Bankruptcy Act, some of the many cases so holding being cited in the opinion of the Court of Appeals (Tr. 248).

It necessarily follows that the argument contained in the Petition for Rehearing in relation to *Erie Railroad* v. *Tompkins* is based upon a misconception of the rule announced in that case. We discuss that decision, and the other cases following *Erie Railroad* v. *Tompkins,* under our Points II and III below.

Petitioners' principal contention under their Point I of their "Argument" is that the opinion of the Court of Appeals is in "direct conflict" with the decision in the *Hummel* case in the Illinois Supreme Court, and that this so-called "direct conflict" has to do with an interpretation of Section 49 of the Illinois Chancery Act and therefore involves "a question of Illinois property law." It is petitioners' principal contention that the Court of Appeals construed Section 49 contrary to the Illinois statutes and decisions.

There is not the slightest foundation for this contention. As the Court of Appeals' opinion clearly shows, the only question of Illinois property law involved in this case or in the *Hummel* case was whether the vested equitable life estate of a beneficiary under a non-spendthrift trust is transferable property under Illinois law, including Section

49 of the Illinois Chancery Act. The Court of Appeals has correctly cited (Tr. 240-1) *The Merchants Loan and Trust Co.* v. *Patterson,* 308 Ill. 519; *Binns* v. *LaForge,* 191 Ill. 598; *Hiss* v. *Hiss,* 228 Ill. 414; *Blair* v. *Linn,* 274 Ill. App. 23; *Blair* v. *Commissioner,* 300 U. S. 5; *Brown* v. *Fletcher,* 235 U. S. 589; and, finally, the very opinion in *Hummel* v. *Cardwell,* 390 Ill. 526, all as authority holding that both under Illinois law and under Federal law the bankrupt's vested equitable life estates here involved were transferable property.

Perhaps we should also add, though not noted by the Court of Appeals' opinion, that the fraudulent bankrupt himself treated his vested equitable life estates involved in this case as transferable property, as the Special Master in the bankruptcy case found (Tr. 125, 189).

None of these authorities are controverted by the Petition for Certiorari. The only case cited in the Petition (p. 15, 21) as contrary is *Hopkinson* v. *Swaim,* 284 Ill. 11. This was a spendthrift trust case, and is therefore without the slightest applicability to the issue of transferability of vested equitable life estates under such non-spendthrift trusts as are involved in the case at bar.

As for the *Hummel* case itself, this case squarely held that the bankrupt's vested equitable life estate was transferable, as the Court of Appeals noted in its opinion (Tr. 240-1).

So far as the Supreme Court of Illinois held in the *Hummel* case that Section 49 constitutes "a rule of property and not of procedure only," this rule of property is that a vested equitable life estate of a beneficiary under an Illinois non-spendthrift trust is transferable property, even though it is not subject to levy under Section 49, *i.e.,* such vested equitable life estate may be fully and freely trans-

ferred by the beneficiary, regardless of Section 49. The argument in the Petition for Certiorari (p. 14) that the *Hummel* case did not confirm such transferability because the *Hummel* case held that a vested equitable life estate is not administrable under Section 70(a)(5) of the Bankruptcy Act merely shows that the true conflict between the *Hummel* case and the opinion of the Court of Appeals is over the interpretation of the Bankruptcy Act, and not over Section 49.

This true conflict between the *Hummel* case and the Court of Appeals' opinion relates exclusively to the correct interpretation of Section 70(a)(5) of the Bankruptcy Act. This is shown by that part of the Illinois Supreme Court's opinion in the *Hummel* case which appears on pages 533-535 of the opinion, the concluding paragraph of which is quoted in the Petition for Certiorari (p. 13-14).

Respondent fully concedes that the construction of Section 70(a)(5) of the Bankruptcy Act by the Illinois Supreme Court in the *Hummel* case is at variance with the construction of the same clause placed thereon by the Court of Appeals' opinion in the case at bar. But this divergent construction of Section 70(a)(5) of the Bankruptcy Act bears not the slightest relation to Illinois property law or to the so-called "rule of property" established by Section 49.

Thus we see that there is no important question of local law decided by the Court of Appeals in a way probably in conflict with applicable local decisions, so as to permit *certiorari* under Rule 38(5) of this Court. The decision in the case at bar by the Court of Appeals was that the order of dismissal of respondent's complaint in the District Court should be reversed with directions to proceed further in the trial court in accordance with the conclusion that Section

49 was not a barrier to the transferability and consequent administrability in bankruptcy of the vested equitable life estates, the "title" to which had "vested" in the Bankruptcy Trustee under Section 70(a)(5) of the Bankruptcy Act.

An examination of the opinion of the Illinois Supreme Court in the *Hummel* case clearly shows that the purported interpretation therein of Section 70 of the Bankruptcy Act constituted mere *dictum* and was not necessary to the Illinois Supreme Court's decision in the *Hummel* case. In other words, there was an adequate and independent non-federal ground of decision to support the judgment in the *Hummel* case, in that the Illinois Supreme Court squarely held that by virtue of two "consent decrees" the bankrupt, Huszagh, had voluntarily transferred her vested equitable life estate in an Illinois non-spendthrift trust more than four months prior to her adjudication in bankruptcy. When the *Hummel* case was brought upon a petition for *certiorari* before this Court, it was vigorously maintained by the transferee (the respondent in that case) that, such transfer having been made more than four months prior to the bankruptcy, the decision of the Illinois Supreme Court was correct upon the non-federal ground in any event, and that therefore the purported interpretation of Section 70 of the Bankruptcy Act was merely *obiter dictum* (Tr. 187). All of the text writers who have had occasion to discuss the *Hummel* case, while agreeing that the decision was correct for the reason mentioned, have vigorously assailed the *dictum* in the *Hummel* case purporting to construe Section 70(a)(5) of the Federal Bankruptcy Act. (See 41 Ill. Law Review, p. 214-7; 34 Ill. Bar Journal No. 6, p. 262-4; Illinois Law of Future Interests (Carey and Schuyler), 1947, Pocket Parts, page 137; 44 Ill. Law Review, p. 736-7.)

None of the other cases cited by petitioners under their Point I are in conflict with what is said above. The case of *Potter* v. *Couch*, 141 U. S. 296, held that Section 49 constitutes a "rule of property," but this case did not involve a vested equitable life estate in an Illinois non-spendthrift trust, nor the transferability thereof under both Illinois and Federal law, and the consequent administrability thereof under the Federal Bankruptcy Act.

As for the case of *Spindle* v. *Shreve*, 111 U. S. 542, it clearly appears from the Court of Appeals' opinion (Tr. 244) that this case involved a spendthrift trust and was decided in 1884 under the Bankruptcy Act of 1873, which early Bankruptcy Act did not provide that transferable property is administrable property, as did the Bankruptcy Acts of 1898 and 1938, both of which specifically so provided in Section 70(a)(5). The case of *Knight* v. *Gregory*, 389 Ill. 554, held that Section 49 is not an exemption statute, and that Section 49 was passed solely for the purpose of giving effect to the common law rule that no jurisdiction existed in equity to entertain a creditor's bill to reach a beneficial interest under a trust which was not set up by the debtor himself. The case bears no relationship to bankruptcy whatsoever.

The case of *Durant* v. *Hospital Life Insurance Company*, Federal Cases No. 4188, had reference to the Bankruptcy Act of 1869 which, like the Bankruptcy Act of 1873, did not provide for administrability in bankruptcy of transferable property, as did both the Acts of 1898 and 1938.

As for the case of *Eaton* v. *Boston Trust Co.*, 240 U. S. 427, to which petitioners devote two pages (p. 18-19), this case is correctly analyzed in the opinion of the Court of Appeals (p. 244-5) as a holding directly contrary to the interpretation placed thereon in the Petition for Certiorari.

As the Court of Appeals' opinion correctly states, the *Eaton* case involved a spendthrift trust, as Judge Holmes specifically held, citing *Boston Safe Deposit & Trust Co.* v. *Luke*, 220 Mass. 484, 108 N. E. 64 to that precise effect. Later Massachusetts cases squarely hold that a Bankruptcy Trustee may administer beneficial interests in non-spendthrift trusts, identical with the Joslyn Trusts in this respect. See also *National Shawmut Bank* v. *Fitzpatrick*, 256 Mass. 125, 152 N. E. 328; *Forbes* v. *Snow*, 245 Mass. 85, 140 N. E. 418, both of which were decided subsequently to the *Luke* and *Eaton* cases, thus confirming the Court of Appeals construction of the *Eaton* case. The purported construction of the *Eaton* case in the Petition is simply erroneous, and the true holding in that case is fully in conformance with the Court of Appeals' opinion in the case at bar.

The Petition for Certiorari devotes two pages (p. 20-1) to arguing that the Court of Appeals' opinion, if allowed to stand, will create "two bodies of property law in Illinois, one applicable in actions decided by the State courts and another in diversity actions in the federal courts"; and that this will have "dire effects upon the Illinois law of trusts and the property rights of settlors and beneficiaries alike."

There is no foundation for this contention. The Court of Appeals' decision in no way creates a new body of property law in Illinois. All that it does is to apply the statutory enactment of Section 70(a)(5) of the Bankruptcy Act with uniformity throughout the United States, including the State of Illinois, whereby all property which under local "rules of property" is held to be transferable shall be thereby administrable in bankruptcy.

In truth and in fact, as to the petitioners' argument of "dire effects," the shoe is entirely on the other foot. If

the position taken by petitioners were upheld, all uniformity of bankruptcy administration throughout the United States would be destroyed by the elimination of the uniform rule that all transferable property is administrable in bankruptcy, and by substituting therefore the rule that whatever differing restrictions may exist limiting the rights of local state court judgment creditors to levy upon their debtor's property, under the forty-eight different State Statutes relative thereto, shall be equally applicable in bankruptcy. Indeed, there would be no need for a Federal Bankruptcy Act under Article I, Section 8 of the Federal Constitution permitting Congress to "establish . . . uniform laws on the subject of bankruptcies throughout the United States," if all transferable properties are not to be uniformly administered in bankruptcy, as is provided in Section 70(a)(5) of the Bankruptcy Act.

This Court has long since disposed of the petitioners' prime contention by holding that all transferable property is subject to bankruptcy administration under the Federal Bankruptcy Act regardless of whether or not it is subject to levy under the laws and statutes of the several states. The cases of *Board of Trade* v. *Johnson,* 264 U. S. 1, and *Page* v. *Edmunds,* 187 U. S. 596, cited in the Court of Appeals' opinion (p. 246) both squarely held, in spite of decisions in the Illinois and Pennsylvania Supreme Courts directly to the contrary, that transferable property is administrable in bankruptcy under Section 70 (a)(5) of the Federal Bankruptcy Act, regardless of whether or not such property was subject to levy under the laws and statutes of Illinois and Pennsylvania, respectively. The statement in the Petition for Certiorari (p. 20-1) that the Court of Appeals' opinion in this case grants a Bankruptcy Trustee "a new remedy and relief never granted heretofore to any creditor bankruptcy trustee" is not only contradicted by the foregoing decisions of this Court, but by

countless other decisions in all of the other Circuit Courts of Appeals in which this issue has arisen. Among the cases to which we refer are the following:

Fisher v. *Cushman,* 103 Fed. 860 (1st Cir.) (a liquor license which was transferable and was therefore held administrable, although not subject to levy or execution under Massachusetts law);

In re Coleman, 136 Fed. 818 (2nd Cir.) (a right to change the beneficiary in a life insurance policy which was transferable and was therefore held administrable, although not subject to levy or execution under New York law);

In re White, 174 Fed. 333 (2nd Cir.) (same, under New York law);

In re Wright, 157 Fed. 544 (2nd Cir.) (same as to insurance commissions, under New York law);

In re Orear, 178 Fed. 632 (8th Cir.) (same, under Missouri law);

Pollack v. *Meyer Bros. Drug Co.,* 233 Fed. 861 (8th Cir.) (a vested equitable interest in trust property which was held transferable and was therefore held administrable, although not subject to levy or execution under Missouri law);

Whittridge v. *Sweetser,* 75 N. E. 222, affirmed 204 U. S. 538 (same, under Massachusetts law);

U. S. v. *Schireson,* 116 Fed. (2d) 881 (3rd Cir.) (same, under Pennsylvania law);

In re Irwin, 60 Fed. (2d) 495 (10th Cir.) (a vested equitable right in income from Indian headrights which was held transferable and therefore administrable, although not subject to levy or execution under Oklahoma law);

In re Landis, 41 Fed. (2d) 700 (7th Cir.) (a contin-

gent trust interest which was held transferable and therefore administrable, although not subject to levy or execution under Illinois law).

All of the foregoing decisions were based upon the uniform interpretation of the Federal Bankruptcy Act which is confirmed by the Court of Appeals' opinion in this case. The interpretation placed upon the Bankruptcy Act in the *dictum* in the *Hummel* case, on the other hand, would produce chaos in bankruptcy administration, by reducing the Bankruptcy Trustee's claim to administer property to the rights of judgment creditors under the 48 different rules in the various states. A bankrupt corporation having identical assets in various states would find its assets come within bankruptcy administration in some of the states, but not in others where different state laws and statutes govern a judgment creditor's rights.

Instead of producing "two bodies of property law in Illinois," therefore, the Petition for Certiorari would substitute 48 different rules in place of the uniform administrability of transferable property throughout the forty-eight states, which uniformity was the very purpose for which Article I, Section 8 of the Federal Constitution in relation to the establishment of "uniform laws on the subject of bankruptcies throughout the United States" was inserted in the Federal Constitution.

II.

The doctrine of Erie Railroad v. Tompkins, 304 U. S. 64, does not apply to Federal Statutes such as the Federal Bankruptcy Act.

Under their Point II, petitioners cite the *Erie* case as authority for the proposition that the Federal Courts "in diversity actions brought by trustees in bankruptcy" are

compelled to follow state decisions with respect to what constitutes "property," together with *Guaranty Trust Co.* v. *York*, 326 U. S. 99, and *Angel* v. *Bullington*, 330 U. S. 183. At the same time, they seek (p. 23) to distinguish *Marine Harbor Properties, Inc.* v. *Manufacturers Trust Co.*, 317 U. S. 78.

This is a complete misunderstanding of the rule in *Erie Railroad* v. *Tompkins*. This rule has never been applied to Federal statutes, such as the Federal Bankruptcy Act, which take precedence over all local rules of law in conflict therewith. This is made clear by the cases cited in the Court of Appeals' opinion (p. 248-9), including *Marine Harbor Properties, Inc.* v. *Manufachurers Trust Co.*, 317 U. S. 78, *Kalb* v. *Feuerstein*, 308 U. S. 433, and *Wright* v. *Union Central Life Insurance Co.*, 304 U. S. 502, all of which hold that federal bankruptcy power "is paramount and supreme," even though it may "modify and affect the property rights established by state law." This Court has also specifically held in *Heiser* v. *Woodruff*, 327 U. S. 726, that *Erie Railroad* v. *Tompkins* does not require the Federal Courts to follow local rules of law in applying the uniform Federal Bankruptcy Act. In *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176, this Court specifically declared that the *Erie* case is inapplicable to "the sweep of federal statutes." See also *Wragg* v. *Federal Land Bk.*, 317 U. S. 325, holding that rights created by state law and statutes are wholly subordinate to the applicability of the Federal Bankruptcy Act, citing *Prudence Realization Corp.* v. *Geist*, 316 U. S. 89.

The cases cited by petitioners are in no way contrary to the foregoing decisions. Both the *Guaranty Trust Co.* case and the *Angel* case dealt with interpretations of state statutes, and neither of them involved bankruptcy or any other broad federal statute similar thereto. In fact, this Court

made the distinction clear by saying in the *Guaranty Trust* case (p. 101):

> "We put to one side the considerations relevant in disposing of questions that arise *when a federal court is adjudicating a question based on federal law.*" (Italics added.)

Petitioners' final sentence under their Point II again claims that the Court of Appeals' opinion "will breed conflict between the Federal and State Courts where there has been harmony heretofore." As indicated at the end of our discussion of their Point I above, exactly the contrary is the case. If the Bankruptcy Courts are compelled to follow the doctrine of the *Hummel* case, there will be not only conflict but utter chaos in the administration of the uniform Federal Bankruptcy Act where, with the sole exception of the dictum in the *Hummel* case purporting to construe the Federal Bankruptcy Act, there has been "harmony heretofore."

III.

The argument that the Court of Appeals should not have held that transferable property is administrable under Section 70(a)(5) of the Federal Bankruptcy Act, upon the theory that this case is "grounded solely upon diversity of citizenship," is without merit.

Under their Point III petitioners cite *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, in support of the proposition that the Federal Court should in a diversity of citizenship case bar Bankruptcy Trustees from administering transferable property.

The *Woods* case involved a purely local issue, namely, whether an unqualified foreign corporation should be barred from suing in the Federal Court in Mississippi when the same corporation was barred from suing in the Mississippi

State Courts by the local Mississippi statute. This Court held, citing *Erie Railroad* v. *Tompkins,* that the Federal Courts should not grant a right to sue in the Federal Courts to a foreign corporation which, by virtue of its not being qualified to do business in Mississippi, was forbidden to sue in the Mississippi State Courts.

Plainly this case has nothing whatever to do with the uniform Federal Bankruptcy Act, nor any issue involved in the case at bar. The *Woods* case cites and relies upon *Guaranty Trust Co.* v. *York,* 326 U. S. 99, which specifically excludes the applicability of the *Erie Railroad* case "when a federal court is adjudicating a question based on federal law," such as the uniform Federal Bankruptcy Act, as we have already shown above.

Moreover, this Point III is also without merit since it is based upon the untenable theory that the District Court in the case at bar had only diversity jurisdiction, when in fact it also had jurisdiction under Sections 23(b) and 70(e)(3) of the Bankruptcy Act, as above indicated.

IV.

The argument that this action should be transferred to the State Court, or dismissed so as to require the Bankruptcy Trustee to sue in the State Court, is an issue which was not raised in the District Court or in the Court of Appeals until the filing of the Rehearing Petition therein, and which is otherwise without merit.

As their Point IV, petitioners argue that this plenary suit should have been remanded by the Court of Appeals "with directions to have the question of Illinois property law submitted to state courts for a determination." Three cases are cited in support of this proposition: *Thompson* v. *Magnolia Co.,* 309 U. S. 478; *Chicago* v. *Fieldcrest Dairies,* 316 U. S. 168; and *Mangus* v. *Miller,* 317 U. S. 178.

In the first place, there is no "question of Illinois property law" involved in the case at bar. On the contrary, as we have clearly shown above, the sole issue is whether Illinois property, which is held by both Illinois and Federal law to be fully transferable, is thereby within the sweep of the uniform Federal Bankruptcy Act which provides in Section 70(a)(5) that all transferable property shall be administrable in bankruptcy.

There is nothing in any one of the three cases cited by petitioners in conflict with the foregoing. On the contrary, the issues in each of these three cases were purely local issues subject to the ultimate decision of the local state courts. Whereas, in the case at bar, the only issue is a federal issue which is ultimately determinable only in the Federal Courts because it arises only under Federal law.

In the *Thompson* case, the question as to whether a local issue should be left to the state law arose in the bankruptcy case itself, and not in a plenary suit already commenced by the bankruptcy trustee, as in the case at bar. The issue in that case was purely local, for it involved solely a question of local land title law (oil rights under a right-of-way owned by a railroad). The *Fieldcrest Dairies* case dealt exclusively with a local issue of Illinois law, and this Court ruled that the case should be returned to the District Court with directions to withhold final decision there until the Illinois State Courts had had time to decide such issue. The *Mangus* case involved a Utah statute relating to the purely local issue of land title law distinguishing tenancies-in-common from joint tenancies.

It is obvious that none of these three cases has the slightest applicability to the issue arising under the broad sweep of the uniform Federal Bankruptcy Act which is involved in this case.

Under their Point IV petitioners also maintain that even if the opinion in the *Hummel* case contained mere *dictum* on the point in issue here, it must nevertheless be followed in the Federal Courts, citing *Hawks* v. *Hamill*, 288 U. S. 52 and *Yoder* v. *Nu-Enamel Corporation*, 117 Fed. (2d) 488. These cases, however, concerned interpretations of Oklahoma and Nebraska Statutes, respectively, and not a Federal Statute constitutionally required to be uniform in its operation throughout the United States. Such *dicta*, therefore, are not binding upon the Federal Courts and are not followed by the Federal Courts when such expressions are in conflict with the Federal Court's construction of the Federal Bankruptcy Act.

As we have already indicated above, the Court of Appeals had no power to follow the suggestion recommended under Point IV of the Petition for Certiorari. The Court of Appeals could only affirm or reverse the order of dismissal in the District Court. It could neither direct that the plenary case be transferred to the state court, on the one hand, nor direct the Bankruptcy Trustee to bring a new plenary suit in the state court, on the other hand.

All that their Point IV really amounts to is that petitioners seek to preserve the misconstruction of the Federal Bankruptcy Act inherent in the *dictum* in the *Hummel* case decided by the Illinois Supreme Court. This is made clear by the statement in their "Conclusion," in which petitioners repeat their contention that the failure to compel the Federal Court to follow this *dictum* will result in "two bodies of property law in Illinois," in place of "uniformity in the state courts and Federal courts in diversity actions."

We have already seen that this reference to diversity actions is not only inapplicable to the case at bar, but is a false issue, for the cases cited above in the Court of Appeals'

opinion and decided by this Court clearly hold that not only the lower Federal Courts, but the State Courts as well, are compelled to adopt the uniform construction of the Federal Bankruptcy Act which has been adopted by this Court and all of the several Courts of Appeals. Apparently petitioners seek to have one rule of construction of the uniform Federal Bankruptcy Act in Federal Courts in diversity actions, and another rule, apparently to be governed by State Court decisions, in the Federal Courts in non-diversity actions. This would indeed result in a state of chaos in relation to bankruptcy which it is hard to believe that even petitioners would recommend. Yet this would be the inevitable result of the position taken in the Petition for Certiorari.

Conclusion.

We conclude that this is clearly not a case for *certiorari*. It is still in its preliminary stages, so that none of the issues presented here may be those upon which the case is ultimately tried in the District Court and disposed of there. This Court does not grant *certiorari* merely to enlighten the parties or correct expressions in the Court of Appeals which the petitioners believe erroneous. There is no conflict between the Court of Appeals decision in this case, and the decisions in any other Court of Appeals. On the contrary, the decision in this case is in conformity with all of the earlier decisions in this Court and in every other Court of Appeals, six of which have already decided the same questions in the same way. The only contrary view is a *dictum* in the Illinois court in the *Hummel* case, in which case *certiorari* was no doubt rejected in this Court because the actual decision was correct upon a non-federal ground. All the text writers, and the Federal Court itself in *Hodam* v. *Jordan*, 82 Fed. Supp. 183, 189 (Tr. 248), have alike condemned this *dictum* and characterized it as such. And

finally, a contrary result in this case would actually produce chaos in the form of 48 different rules as to *what* transferable property is administrable in bankruptcy, in place of the uniformity which now exists that *all* transferable property is administrable by Bankruptcy Trustees under the Uniform Federal Bankruptcy Act.

For the foregoing reasons it is respectfully submitted that this is not a proper case for review by *certiorari*, and that the Petition for such Writ should be denied.

Respectfully submitted,

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